U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 March 2005

BALCA Case No.: 2004-INA-30
ETA Case No.: P2003-NY-02480428

In the Matter of

BEVERLY FETNER,
Employer

on behalf of

SATYWATTIE TAJHRAM,
Alien.

Appearance: S. Bernard Schwarz, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Delores DeHaan
New York, New York

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer (CO) of a private household's application for alien employment certification for the position of Live-in Domestic Cook. Permanent alien employment certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and Title 20, Part 656 of the Code of Federal Regulations.

In this case, the CO raised the issue of whether the Employer was offering a *bona fide* job opportunity for a Domestic Cook -- a skilled position -- or whether the position was actually for an unskilled domestic worker. In a Notice of Findings (NOF), the CO requested extensive documentation from the Employer to establish the *bona fides* of the position. (AF 30-33). The CO later denied certification on the ground that the Employer had failed to establish sufficient funds to pay the Alien. (AF 42-43). The CO also denied certification on the ground that the Alien lacked the requisite year of paid experience as a household domestic cook, as required by 20 C.F.R. § 656.21(a)(3)(iii).

DISCUSSION

Sufficiency of Funds

In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), the Board held that a CO may properly invoke the *bona fide* job opportunity analysis authorized by 20 C.F.R. § 656.20(c)(8) if the CO suspects that the application misrepresents the position offered as skilled rather than unskilled labor in order to avoid the numerical limitation on visas for unskilled labor. In *Carlos Uy*, the Board established a totality of the circumstances test for domestic cook applications, which included as its first element "the percentage of the employer's disposable income that will be devoted to paying the cook's salary." The Board stated in *Carlos Uy* that "[t]he heart of the totality of the circumstances analysis is whether the factual circumstances establish the credibility of the position." In applying the test, the Board found that it was inherently implausible that the Employer in that case would devote approximately one-third of his gross income to pay for a cook.

In addition to the *bona fide* job opportunity requirement, the regulations require that an application for labor certification must clearly show that the employer has enough funds available to pay the wage or salary offered to the alien. 20 C.F.R. § 656.20(c)(1). A CO may make reasonable requests for information demonstrating the ability to pay the wage offered as required by 20 C.F.R. § 656.20(c)(1). *The Whislers*, 1990-INA-569 (Jan. 31, 1992).

The CO cited both section 656.20(c)(8) and section 656.20(c)(1) as grounds for denial.

In the NOF, the CO expressly directed the Employer to provide a copy of the Employer's latest U.S. Federal Income Tax return to document ability to guarantee payment of the Alien's salary. (AF 31). The CO stated that she needed to know what percentage of the Employer's disposable income would be devoted to payment of the Alien's salary, and that the rebuttal "must be supported by providing **signed** copies of your Federal Income Tax Return for 2000 and 2001." (AF 31) (emphasis in original).

The Employer's rebuttal to the NOF relating to the sufficiency of funds available to pay the Alien consisted of a paragraph in a cover letter from its attorney, and two partial tax returns. The first partial tax return consists of the first page of the Employer's 2001 Form 1040. It shows an adjusted gross income of $82,583. None of the remainder of the tax return is included. (AF 37). The second partial tax return is the first page of the Employer's son's 2001 Form 1040, showing an adjusted gross income of nearly 3.5 million dollars. (AF 36). The attorney argued:

> With respect to employer's ability to pay the wage enclosed please find a copy of Mrs. Fetner's 2001 income tax return showing the adjusted gross income of $82,583. **Also line 8a and 8b show taxable interest income of $8,611 and tax-exempt interest income of $10,442. At the interest rates in the past few years (1% to 2%) this amount is an indication of funds on deposit in the high six figures.** The employer is required to document the ability to pay the wage offered to the worker at the time of filing of the labor certification - April 30, 2001. In any event, should the certifying officer find it insufficient to support the cook's salary of $30,087, we are enclosing first page of the employer's son's income tax return showing the adjusted gross income of $3,466,197. Should the employer need help, which she does not, with paying the cook's salary, the employer's son Mr. Barry Fetner has more than sufficient funds to assist her.

(AF 41) (emphasis as in original).

In the Final Determination, the CO denied the application because the tax return information provided did not establish the "taxable" income that may be devoted to paying the Alien's salary, the tax returns were not complete and did not include signatures, and the son was not the Alien's employer and his income could not be considered. (AF 42).

The Employer filed a Motion to Reopen and Reconsider arguing that the CO had ignored the fact that the Employer had interest income of over $19,000, and enclosing account information to show assets of over one-half million dollars. The account information includes brokerage account and retirement account summaries, a mutual fund summary and a 401K plan summary. (AF 45-55). The CO, however, declined to reconsider. (AF 56).

We affirm the CO's denial of certification.

In a sufficiency of funds citation, what is important is not whether the employer's adjusted gross income, taxable income, disposable income or any other one measure of income is established, but on whether the employer has presented credible evidence that it has enough money available to guarantee the Alien's salary. *See, e.g., Ranchito Coletero*, 2002-INA-105 (Jan. 8, 2004)(*en banc*) (overall fiscal circumstances of the owner of a sole proprietorship should be considered when assessing its ability to pay wages); *Carlos Mery*, 2003-INA-299 (Oct. 18, 2004) (panel held that what was important was not the employer's disposable income, adjusted gross income, or net income but proof that the alien's salary can be guaranteed).

In the instant case, the only documentation presented during the rebuttal stage of the application was the two partial tax returns. The putative Employer's tax return indicates that more than one-third of her income would have to be used to pay the Alien's salary to cook for the household (a single person) and guests. The Employer's attorney suggests that the interest income shown on the return establishes significant assets. But a

suggestion of significant assets on which interest is paid does not establish that those assets are liquid or would credibly be used to pay the salary of a household cook.

The Employer submitted additional documentation with its Motion to Reopen and Reconsider showing the existence of a brokerage account, mutual funds and retirement accounts. We cannot consider evidence not the in record upon which the CO denied certification. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*). Since the CO denied reconsideration without considering this additional documentation, we may not consider it. Even if it was in the record we could review, we observe that significant portions of the assets are in retirement accounts which might be penalized if early withdrawals were made. Moreover, even though the Employer's assets are substantial, paying the Alien's salary would significantly deplete those assets within a few years.

Although the attorney argued that the Employer's son has ample funds to cover the Alien's salary, we do not accept the attorney's argument as proof that the son had made any commitment to accept such a liability. Such a substantial commitment would have to be documented to establish the ability to guarantee the Alien's salary. Moreover, the rebuttal indicates that the Employer is planning on covering the Alien's salary out of her personal funds.

The CO did err in one respect. Under the totality of circumstances test used in section 656.20(c)(8) domestic cook cases, the CO is to weigh all the circumstances. Thus, there may be exceptional cases in which an employer's circumstances are so unique or grave that it would be credible to believe that the household would devote a substantial portion of its funds to pay the salary of a domestic cook. Thus, the CO should have looked at all of the evidence of record to see if there were such exceptional circumstances present in this case. We find, however, that this error was harmless. First, we have reviewed the record and find that it does not establish such exceptional circumstances. Although the Employer has osteoarthritis, such a circumstance does not credibly establish that the Employer would devote a large portion of her yearly income or deplete her assets

to pay for a domestic employee whose only duties are to cook. Indeed, a note from the Employer's physician in the record states "requires as a medical necessity a cook to assist in home care & for cooking." (AF 38). If the Employer's medical condition had suggested a need for a domestic caregiver, it might be credible that the Employer would tap into her assets. It is not credible, however, that she would do so solely to pay a cook without a credible explanation.

Second, the CO also used section 656.20(c)(1) as grounds for denial. This section does not require a weighing of all the evidence, and requires a "clear" showing of a ability to guarantee the Alien's salary. We find that the CO did not err in concluding that such a clear showing had not been made.

Finally, we note that the CO directed the Employer to provide complete, signed copies of two years of tax returns. The Employer, however, only submitted the first page of a single year's tax return. Where the CO requests a document or information which has a direct bearing on the resolution of the issue and is obtainable by reasonable effort, the employer must produce it. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). The CO's request for complete tax returns for two years was reasonable, and the Employer's failure to submit the documentation or explain why it was not obtainable by reasonable effort provides a separate ground for denial of the application.

This case was submitted to the CO as a request for reduction in recruitment. This panel has held that when the CO denies an RIR, such denial should result in the remand of the application to the local job service for regular processing. *Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003). Subsequently, this panel recognized that there are exceptions to the remand rule, such as where the employer fails to comply with a deadline set by the CO for responding to the CO's inquiries about the RIR request, *Houston's Restaurant*, 2003-INA-237 (Sept. 27, 2004), or where the application is so fundamentally flawed that a remand would be pointless (such as where the employer has not set forth a *bona fide* job opportunity), *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004). Similarly, we hold that where the Employer has failed to establish sufficiency of funds to

pay the Alien's wages for the position for which labor certification is sought, the application is so fundamentally flawed that a remand would be pointless.

One Year of Paid Experience

In this case, the job offered was for a live-in domestic cook. The Alien's experience was not as a domestic cook but as a cook in a restaurant. The regulation at 20 C.F.R. § 656.21(a)(3)(iii), provides that if the application involves a job offer as a live-in domestic service worker the Employer is required to document the alien's paid experience the total of which must be equal to one full year's employment on a full time basis. The regulation does not expressly state that the one year of experience requirement must be as a domestic worker. The Board has held, *en banc*, that the purpose of this requirement is to demonstrate that the alien is tied to domestic service as an occupation given the high turnover and no shortage of workers for these jobs, which require little or no education or experience. *Marvin and Ilene Gleicher*, 1993-INA-3 (Oct. 29, 1993) (*en banc*). Thus, it is implicit in the regulation that the year of experience documentation requirement is designed to establish the alien's commitment to domestic service and that the one year of experience means in domestic service.

The Employer cites *Ron Arthur*, 2002-INA-54 (Oct. 24, 2002), in support of the argument that the alternative experience of commercial cook would "not only be permissible in a domestic cook case but required." *Ron Arthur* involved an application for a domestic cook, the employer having required two years of experience as a domestic cook. The alien lacked that experience, having instead over two years experience as a cook in the hotel and restaurant business. The Board, in affirming the denial, noted that U.S. workers were not given an equal opportunity to qualify for the position as was provided to the alien, as the related occupation of cook in the hotel and restaurant business had not been not listed in the ETA 750A as an alternate qualifying experience. *Ron Arthur*, however, did not involve a live-in position, which is the dispositive fact in this case.

The CO did not err, therefore, in finding that 20 C.F.R. § 656.21(a)(3) applied, and that the Employer failed to comply with this requirement. The CO therefore properly denied the Employer's Reduction in Recruitment request on this ground.

ORDER

The Certifying Officer's denial of alien labor certification is **AFFIRMED**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, D.C. 20001-8002

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typed pages. Upon the granting of a petition the Board may order briefs.